

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RHODNEY HENDERSON, et al.,

Plaintiff(s),

v.

ARIA RESORT & CASINO HOLDINGS,
 LLC, et al.,

Defendant(s).

Case No. 2:21-cv-00280-JAD-NJK

REPORT AND RECOMMENDATION

[Docket No. 80]

Pending before the Court is Plaintiffs' motion for leave to file a third amended complaint. Docket No. 80. Defendants filed a response in opposition. Docket No. 81. Plaintiffs filed a reply. Docket No. 82. The motion is properly resolved without a hearing. *See* Local Rule 78-1. For the reasons discussed more fully below, the undersigned **RECOMMENDS** that the motion for leave to amend be **DENIED**.

I. BACKGROUND

This case arises out of an incident during Plaintiffs' stay at the Aria Resort and Casino in June 2019. *See* Second Amended Complaint (Docket No. 61) at ¶ 19. Plaintiffs bring racial discrimination suit on the grounds that they were wrongfully trespassed and mistreated because of their race.¹

The deadline to amend expired on August 31, 2021. *See* Docket No. 23. After granting in part Defendants' motion to dismiss, Judge Dorsey allowed Plaintiffs until June 10, 2022, to file a second amended complaint as to only the claims for intentional infliction of emotional distress. Docket No. 60 at 13. On June 10, 2022, that second amended complaint was filed. Docket No. 61. On December 22, 2022, Plaintiffs sought leave to file a third amended complaint. Docket No.

¹ A fulsome overview of the factual allegations has been provided elsewhere by United States District Judge Jennifer A. Dorsey. Docket No. 60 at 2-5.

1 78. On December 27, 2022, that motion was denied without prejudice for failing to address the
2 governing standards. Docket No. 79. On January 25, 2022, Plaintiffs renewed their motion for
3 leave to file a third amended complaint, which is the motion currently before the Court. Docket
4 No. 80. Discovery is set to close on April 13, 2023, Docket No. 77 at 5, and is not expected to be
5 extended, *see id.* at 6 (granting seventh request to extend discovery deadlines with admonition that
6 “**NO FURTHER EXTENSIONS WILL BE GRANTED**” (emphasis in original)).

7 **II. STANDARDS**

8 When a party moves to amend the pleadings after the expiration of the deadline established
9 in the scheduling order, courts review the motion through a two-step process. As a threshold
10 matter, courts treat the motion as seeking to amend the scheduling order. Such a request implicates
11 the “good cause” standard outlined in Rule 16(b) of the Federal Rules of Civil Procedure. *Johnson*
12 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). “Rule 16(b)’s ‘good cause’
13 standard primarily considers the diligence of the party seeking the amendment.” *Id.* at 609. In
14 particular, courts look to whether the deadline set in the scheduling order “cannot reasonably be
15 met despite the diligence of the party seeking the extension.” *Id.* The diligence inquiry also
16 addresses other pertinent circumstances, including whether the movant was prompt in seeking
17 relief from the Court once it became apparent that relief from the scheduling order was needed.
18 *See Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citing *Eckert Cold Storage,*
19 *Inc. v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal. 1996)). Although prejudice to the opposing party
20 may also be considered, the focus of the inquiry is on the movant’s reasons for seeking
21 modification. *Johnson*, 975 F.2d at 609. “If that party was not diligent, the inquiry should end.”
22 *Id.* The party seeking amendment bears the burden of establishing diligence. *See Singer v. Las*

1 *Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1077 (D. Nev. 2019); *see also Morgal v. Maricopa*
 2 *County Bd. Of Supervisors*, 284 F.R.D. 452, 460 (D. Ariz. 2012).²

3 A motion for leave to amend filed after the expiration of the corresponding deadline also
 4 requires a showing of excusable neglect. *See Branch Banking & Trust Co. v. DMSI, LLC*, 871
 5 F.3d 751, 764-65 (9th Cir. 2017); *see also* Local Rule 26-3. The excusable neglect analysis is
 6 guided by factors that include (1) the danger of prejudice to the opposing party; (2) the length of
 7 the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether
 8 the movant acted in good faith. *Branch Banking*, 871 F.3d at 765. The party seeking amendment
 9 bears the burden of establishing excusable neglect. *See id.* (affirming finding of no excusable
 10 neglect based upon the movant's failure to provide a sufficient showing).

11 When the movant has sufficiently established a sufficient basis for obtaining relief from
 12 the deadline to amend pursuant to Rule 16(b), courts then advance to the second step of examining
 13 whether amendment is proper under the standards outlined in Rule 15(a). Rule 15(a) provides that
 14 "[t]he court should freely give leave [to amend] when justice so requires," and there is a strong
 15 public policy in favor of permitting amendment. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir.

17 ² Although the Ninth Circuit has expressed the need for leniency with respect to certain
 18 deadlines in other contexts, it has been "protective of this particular rule, as it deems Rule 16 to be
 19 an essential tool in controlling heavy trial court dockets." *Williams v. James River Grp. Inc.*, ____
 20 F. Supp. 3d ____, 2022 WL 4181415, at *2 n.3 (D. Nev. Sept. 13, 2022) (quoting *Gerawan*
 21 *Farming, Inc. v. Rehrig Pac. Co.*, No. 1:11-cv-01273-LJO-BAM, 2013 WL 645741, at *4 (E.D.
 22 Cal. Feb. 21, 2013)); *see also Martinez-Sanchez v. Anthony Vineyards, Inc.*, No. 1:19-cv-01404-
 23 DAD-JLT, 2021 WL 1696274, at *6 (E.D. Cal. Apr. 29, 2021). Decades of Ninth Circuit precedent
 24 reflect that case management deadlines established in the scheduling order, including the deadline
 25 to amend, must be taken seriously. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027
 26 (9th Cir. 2006) ("The use of orders establishing a firm discovery cutoff date is commonplace, and
 27 has impacts generally helpful to the orderly progress of litigation, so that the enforcement of such
 28 an order should come as a surprise to no one"); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052,
 1060 (9th Cir. 2005) ("In these days of heavy caseloads, trial courts in both the federal and state
 systems routinely set schedules and establish deadlines to foster the efficient treatment and
 resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by
 the parties, and the best way to encourage that is to enforce the deadlines"); *Janicki Logging Co.*
v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994) ("We have held that Federal Rule of Civil Procedure
 16 is to be taken seriously"); *Johnson*, 975 F.2d at 610 ("A scheduling order is not a frivolous
 piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. The
 district court's decision to honor the terms of its binding scheduling order does not simply exalt
 procedural technicalities over the merits of Johnson's case. Disregard of the order would
 undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation,
 and reward the indolent and the cavalier" (internal citation and quotations omitted)).

1999). As such, the Ninth Circuit has made clear that Rule 15(a) is to be applied with “extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (*per curiam*). Under Rule 15(a), courts consider various factors, including: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment; and (5) whether the plaintiff has previously amended the complaint. *See id.* at 1052. Not all of these factors carry equal weight and prejudice is the “touchstone.” *Id.* Absent a showing of prejudice or a strong showing of any of the remaining factors, there is a presumption that leave to amend should be granted. *Id.* The party opposing the amendment bears the burden of showing why leave should not be permitted under Rule 15(a). *Underwood v. O’Reilly Auto Enters., LLC*, 342 F.R.D. 338, 343 (D. Nev. 2022). The “discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.” *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 454 (9th Cir. 2011).

13 III. ANALYSIS

14 Plaintiffs’ motion seeks to add a new claim for false imprisonment as to Sundra Henderson,
15 to newly identify five defendants who were previously only referenced as Doe Defendants, and to
16 newly identify one defendant who had been previously dismissed as incorrectly named. As noted
17 above, the deadline to amend the pleadings or add parties expired on August 31, 2021. *See* Docket
18 No. 23. Plaintiffs argue that they have established the diligence necessary for belated relief from
19 that deadline under Rule 16(b). *See, e.g.,* Docket No. 80 at 5-8; *see also* Docket No. 82.
20 Defendants argue that diligence is lacking and that allowing the late amendments at this juncture
21 would be prejudicial. *See* Docket No. 81 at 6-9.³ Defendants have the better argument.

22 The undersigned begins with the request to amend the complaint to add a new claim for
23 false imprisonment for Plaintiff Sundra Henderson. In arguing that the defense should not be

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25 ³ Defendants couch their arguments in terms of the Rule 15(a) analysis. *See* Docket No.
26 81 at 6-9. Even when the parties do not do so, the Court has a duty to correctly articulate and apply
27 legal standards. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000). The papers
28 provide a sufficient basis for the Court to determine diligence as required by Rule 16(b) despite
Defendants’ failure to address that rule specifically. *Cf. Wagner v. Shasta Cnty.*, No. 2:20-cv-
00403-JAM-DMC, 2021 WL 2534148, at *2 (E.D. Cal. June 21, 2021) (conducting Rule 16(b)
good cause analysis based on arguments for undue delay and prejudice pursuant to Rule 15(a)),
recon. denied, 2022 WL 14861526 (E.D. Cal. Oct. 26, 2022).

1 surprised by this newly-raised claim, Plaintiffs highlight that “Sundra testified that she was told to
2 leave, could not close her hotel room door and was escorted not only to the front desk of the hotel
3 but outside of the hotel.” Docket No. 80 at 9. These same factual allegations were alleged in the
4 initial complaint more than two years ago. *See* Docket No. 1 at ¶¶ 41-42, 44-45. Indeed, Plaintiffs
5 effectively concede that the factual circumstances on which they seek to amend the complaint with
6 a new claim for false imprisonment have been known since the initiation of litigation. *See, e.g.,*
7 Docket No. 82 at 1 (“The Hendersons’ allegations in the Complaint will remain substantially
8 unchanged in their Third Amended Complaint”). Waiting for two years to bring a claim based on
9 previously alleged factual circumstances is the antithesis of the diligence required to establish good
10 cause to modify the scheduling order. *Cf. Branch Banking*, 871 F.3d at 765 (“The defenses and
11 counterclaim they sought to add were based on the work-out agreement, which Defendants knew
12 about long before the deadline to amend had passed. Defendants were thus not diligent”).

13 Good cause is also lacking to reopen the case management deadline to add new parties by
14 identifying the Doe Defendants. The identities of five Doe Defendants at issue (Leticia Anzalone,
15 Wendy Uhl, Eddie Perez, Winter Prescott, and Andres Rodriguez) became clear from discovery
16 dating back to at least April 4, 2022. *See* Docket No. 81-1 at 17-18. Nonetheless, Plaintiffs waited
17 almost nine months to file a motion for leave to amend to name these Doe Defendants. *See* Docket
18 No. 78. Such a lengthy delay is indicative of a lack of diligence. *See, e.g., Sako v. Wells Fargo*
19 *Bank, Nat. Ass’n*, No. 14-cv-01034-GPC (JMA), 2015 WL 5022326, at *2 (S.D. Cal. Aug. 24,
20 2015) (finding lack of diligence in filing motion to amend less than two months after discovering
21 new facts at deposition). Nonetheless, Plaintiffs contend that they were diligent in seeking to name
22 these defendants because they were hoping the case would be resolved at a settlement conference
23 and because they needed to strategize on the claims to bring. *See, e.g.,* Docket No. 80 at 6-7. The
24 undersigned is not persuaded. First, it is established law that engaging in settlement discussions
25 or alternative dispute resolution does not create a *post hoc* justification for a lack of diligence. *Cf.*

1 *Williams*, 2022 WL 4181415, at *5-6 (collecting cases).⁴ No meaningful showing has been made
 2 here that a hope of settlement excuses a nine-month delay in taking action to name these defendants
 3 in the pleadings. Second, no meaningful explanation has been provided as to why months of
 4 strategizing were required to name Doe Defendants who were already referenced in the operative
 5 pleadings and whom Plaintiffs seek to add to preexisting claims. *See, e.g.*, Docket No. 80 at 15.
 6 In short, the undersigned is not persuaded that Plaintiffs met their burden in establishing diligence
 7 to amend the pleadings to identify these Doe Defendants. *See, e.g., Kalinkin v. Robinson*, No. 09-
 8 cv-1058-BR, 2010 WL 5158386, at *4-5 (D. Or. Dec. 14, 2010) (denying leave to amend to
 9 identify Doe Defendant filed a year after the lawsuit was initiated and after the deadline to amend
 10 had expired).⁵

11 Good cause is also lacking with respect to Plaintiffs' request to now include Jay
 12 McCullough as a defendant. Plaintiffs previously named Defendant Jerald Hedrick in this action.
 13 *See* Docket No. 36. On July 18, 2022, Plaintiffs stipulated to dismiss Hedrick with prejudice as
 14 incorrectly named. Docket No. 69. "Specifically, by way of deposition testimony, the Parties
 15 have confirmed that Hedrick was mistaken for another Aria employee." *Id.* at 2. Already by that
 16 date, deposition testimony had pointed to Jay McCullough as the security officer "Jay" who
 17 escorted Mr. Henderson to his room. *See* Docket No. 81 at 21 (deposition testimony from June 6,
 18 2022). The stipulation to dismiss Hedrick did not seek to correctly identify McCullough and,
 19 instead, Plaintiffs waited nearly seven months to seek to add Jay McCullough to the case. As with
 20
 21

22 ⁴ The Court permitted a respite from discovery pending the settlement conference based
 23 on, *inter alia*, the indications that discovery had been diligently pursued, the implication that
 24 delaying expert retention would foster the prospects of discovery, and representations that
 25 settlement was likely. *See* Docket No. 71 at 2; Docket No. 73 at 3-4; *see also Williams*, 2022 WL
 26 4181415, at *6 n.8. The parties did not request, and the Court did not grant, relief from promptly
 seeking leave to amend or add parties. Indeed, it makes little sense that, *inter alia*, a plaintiff
 would proceed to a settlement conference in the hope of fully resolving a case with full knowledge
 that some defendants were not named in the pleadings and would not appear at the settlement
 conference. *Cf.* Docket No. 74 at 2 (requiring all parties to appear at the settlement conference).

27 ⁵ In reply, Plaintiffs attempt to fill in the gaps by pointing to various discovery disputes.
 28 *See* Docket No. 82 at 4-5. Regardless of those assertions, however, it remains clear that the
 identities of these defendants were known months earlier and diligence is lacking.

1 the other proposed new defendants, the vague reference to a need to strategize as to adding him to
2 the case falls well short of showing diligence. *See* Docket No. 80 at 6-7.⁶

3 In short, leave to amend is being sought well after the case management deadline for doing
4 so. Good cause has not been established to modify the scheduling order, so such relief should be
5 denied.⁷

6 **IV. CONCLUSION**

7 For the reasons discussed more fully above, the undersigned **RECOMMENDS** that the
8 motion for leave to amend be **DENIED**.

9 Dated: March 31, 2023

10 
11 Nancy J. Koppe
United States Magistrate Judge

12 **NOTICE**

13 This report and recommendation is submitted to the United States District Judge assigned
14 to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and
15 recommendation must file a written objection supported by points and authorities within fourteen
16 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file
17 a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951
18 F.2d 1153, 1157 (9th Cir. 1991).

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20 ⁶ “The existence or degree of prejudice to the party opposing the modification might supply
21 additional reasons to deny a motion [for leave to amend].” *Johnson*, 975 F.2d at 609. Plaintiffs
22 argue a lack of prejudice in allowing the late change to the pleadings, *see, e.g.*, Docket No. 82 at
23 1-2, while Defendants contend that they will be prejudiced given the delay in seeking relief and
24 the current procedural posture of the case, *see, e.g.*, Docket No. 81 at 8. Defendants have the better
25 argument. The discovery cutoff is imminent, *see* Docket No. 77 at 5, which does not leave
26 sufficient time for service and responses to the proposed amended complaint, let alone sufficient
27 time for newly named defendants to meaningfully participate in discovery before the current
28 cutoff. *But see Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999)
29 (“A need to reopen discovery and therefore delay the proceedings supports a district court’s finding
30 of prejudice from a delayed motion to amend the complaint”); *see also Anderson v. Air W., Inc.*,
31 542 F.2d 522, 524 (9th Cir. 1976) (“The law presumes injury from unreasonable delay”).

32 ⁷ Because good cause is lacking to modify the scheduling order, the Court need not opine
33 on whether excusable neglect has been shown for the failure to seek relief from the subject case
34 management deadline prior to its expiration. Moreover, the Court need not opine on whether leave
35 to amend would be warranted under Rule 15(a). *See, e.g., Morgal*, 284 F.R.D. at 460.